Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

80-1043

NO.....

In The

Superior Court of the United States

October Term, 1980

CARLOS GERDES
PETITIONER

vs.

UNITED STATES OF AMERICA
RESPONDENT

PETTITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether an appellate court can sanction a lower court's departure from the mandate and the law of the case resulting in a recalcitrant witness being held in civil contempt contrary to his understanding of the terms of his previously entered plea agreement.

II. Whether a recalcitrant witness can be held in civil contempt *nunc pro tunc,* thus increasing the term of thus increasing the term of his sentence, when the original finding of contempt has been vacated and remanded.

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In The

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October Term, 1980

CARLOS GERDES
PETITIONER

vs.

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, CARLOS GERDES, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinions of the court of appeals (Apps. A and B) are not reported. The orders of the district court (Apps. C and D) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B) was entered on August 25, 1980, and a petition for rehearing was denied on October 15, 1980 (App. E). The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE

The Petitioner on September 18, 1979, pleaded guilty in federal district court to six counts of an indictment dealing with the importation of marijuana. In return, the Government had agreed and in fact did dismiss the remaining count against the Petitioner. This change of plea, during the course of his trial, was entered as a result of plea negotiations between the Petitioner's attorney and the Government, which were reduced to a plea agreement entered into between the parties. (App. A, 1-2).

It was the understanding of the Petitioner that the plea agreement exempted him from coorperating with the Government in any related investigation, similar to an agreement the Government reached with a co-defendant (App. A, 1-2).

Subsequent to the acceptance of the plea, the Petitioner was subpoenaed before a federal grand jury regarding a related investigation. After being granted use immunity, the Petitioner continued to refuse to testify pursuant to his understanding of the plea agreement. The Government disputed his understanding of the agreement. After a hearing before the same district court judge that accepted the Petitioner's change of plea, the Petitioner was held in civil contempt as a recalcitrant witness, *see,* 18 U.S.C. 1826(a), and his federal criminal sentence was tolled for the length of his contempt sentence (App. A, 2-3). The court found that the plea agreement only exempted the Petitioner from testifying at his trial that was taking place when the plea agreement was entered (App. A, 3).

The court of appeals found the pertinent language of the plea agreement to be ambiguous and vacated the contempt order and remanded the cause for an evidentiary hearing. The court implicitly held that the Petitioner could not be held in contempt if the plea agreement was as he construed it. (App. A, 3-4).

Upon remand before a different district court judge, testimony was taken from the attorneys who negotiated the Petitioner's plea agreement and the plea agreement of the co-defendant. The Government attorney who negotiated the plea agreement denied that the Petitioner was exempt from testifying at the trial in progress when his plea was taken. This was contrary to the findings of the first district court judge (App. B, 1-2).

Upon the conclusion of the evidentiary hearing, the second district court judge found the plea agreement to be unambiguous, contrary to the holding of the court of appeals. The Petitioner was held in civil contempt as of the date the first district court judge found him in contempt (January 29, 1980)

despite the fact this order was vacated by the court of appeals (App. D, 1). This resulted in increasing the term of the witness' contempt sentence (which tolled his federal criminal sentence). The court of appeals affirmed and denied the Petitioner's petition for rehearing (App. D and E).

REASONS FOR GRANTING THE WRIT

The court of appeals' sanctioning the lower court's departure from the mandate and the law of the case and allowing the Petitioner to be held in contempt retroactively, raise important questions concerning the efficient and proper administration of the judicial system which should be resolved by this Court. *See, Insurance Group Committee v. Denver & R.G.W.R. Co.*,329 U.S. 607, 611 (1947).

The court's action foreclosed proper and complete review of the scope of the plea agreement. Our system of justice is predicated upon orderly judicial action. Litigants would have little confidence in a system that allows issues to be relitigated or sanctions inferior courts' disobedience of superior courts.

Yet, this is precisely what occurred here. The court of appeals found the plea agreement to be ambiguous. However, on remand, the district court ignored the mandate and found the agreement unambiguous and construed it adverse to the Petitioner.

"The 'law of the case' rule is based on the salutory and sound public policy that litigation should come to an end." *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967). "When an issue of law is decided by an appellate court on appeal and the case is remanded for trial, the issue decided on appeal is closed to further consideration by the trial court." *Rachal v. Allen*, 376 F.2d 999, 1002 (5th Cir. 1967). The court of appeals ignored

these fundamental concepts and this Court must act to rectify the unseemliness of a court altering a legal ruling and to preserve the ingegrity of our orderly judicial system. *See, Zdanok v. Glidden Company, Durkee Famous Foods Divsion,* 327 F.2d 944, 953 (2d Cir. 1964), [*Overruled on other grounds, Local 1251 Int. U. of U.A., A.T. & A.I.W. v. Robertshaw Control Co.,* 405 F.2d Cir. 1968].

On remand, a lower court has no power to deviate from the mandate. *Wm. G. Roe & Company v. Armour & Company,* 414 F.2d 862, 865 (5th Cir. 1969). The decision of a superior court binds the lower court. *Insurance Group Committee,* 329 U.S. at 612. *See,* also, *Quern v. Jordan,* 440 U.S. 332, 99 S. Ct. 1139, 1148 fn. 18 (1979).

The court's deviation from these fundamental and settled principles of judicial administration denied the Petitioner a proper hearing and review of his position that the plea agreement exempted him from testifying before the grand jury.

The Petitioner understood the agreement to exempt him from any testimony. The Government took the contrary position. The first trial judge (who also heard the change of plea) found, contrary to both parties' positions, that the agreement exempted the Petitioner from testifying only at his trial in progress at the time of the plea. The court of appeals found the agreement to be ambiguous and vacated and remanded.

The second district court judge, despite the foregoing, found the agreement to be unambiguous and presumably adopted the Government attorney's testimony that the Petitioner could have been called at the initial trial, contrary to the first judge's finding. The court of appeals' approval of these proceedings requires this Court to exercise its powers of

supervision. The departures from the usual course of judicial proceedings by the trial court, sanctioned by the court of appeals, must be remedied by this Court so to preserve the integrity of and the public confidence in our judicial system.

The court of appeals' disposition of the case rendered a vital portion of its own order a nullity. Its April 4, 1980, decision did not merely remand the trial court's January 29, 1980, order of contempt, but *vacated and remanded* the order. By ignoring its own order finding the original order of contempt to be void and of no effect, see, *Stewart v. Oneal,* 237 F. 243 U.S. 645 (1917), the court of appeals sanctioned the Petitioner being held in contempt retroactively, or *nunc pro tunc.* This increased his contempt sentence (and the tolling his federal criminal sentence) by over four months. *See,* 18 U.S.C. 1826(a).

It is a cornerstone of our judicial system that one cannot be punished retroactively. A sentence does not run from the date of the event, but rather from the date the sentence is imposed. This is especially true when relating the sentence back to an earlier date results in increasing the sentence. This is akin to an *ex post facto* law prohibited by Art. II §9 cl. 3, *U.S. Const.*

A court's ability to enter a retroactive order is very limited. Matthies v. Railroad Retirement Board, 341 F.2d 243 (8th Cir. 1965). The function of a retroactive or nunc pro tunc order is to recite the action that was previously taken, but that was not adequately recorded. *Cairns v. Richardson,* 457 F. 2d 1145, 1149 (10th Cir. 1972). A *nunc pro tunc* order is only utilized for purely procedural purposes, not where it would have a substantive effect. The court of appeals ignored these restrictions in the present case.

The court's conduct undermines our orderly judicial system and operates to deny the Petitioner due process of law. The court of appeals gave with the one hand, but then without justification, took away with the other.

On January 29, 1980, the Petitioner was held in contempt. On April 4, 1980, the court of appeals vacated the order and the Petitioner was no longer in contempt. Yet when the Petitioner was ultimately found in contempt, albeit improperly, it was not as of the date of the second order, but was from the date of the original vacated order.

It was as if the word "vacated" did not appear in the court of appeals' initial decision. The court ignored its own prior decision without any explanation or justification. It changed the rules in the middle of the game to the detriment of the Petitioner.

A litigant cannot expect or demand a favorable result before the courts. But he can expect and is entitled to fair treatment in an orderly and predictable system. An appellate court cannot ignore its own order at its whim, nor can it sanction a lower court's refusal to follow the superior court's mandate. The court's conduct in the present case raises problems that this Court must resolve by invoking its certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December, 1980

APPENDIX

Exhibit A

Aug. 25, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 8-1167
Summary Calendar*

IN RE: GRAND JURY PROCEEDINGS
CARLOS GERDES,

Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

APRIL 4, 1980

Before
AINSWORTH, FAY and RANDALL, Circuit Judges.

PER CURIAM:

Carlos Gerdes appeals from the district court's order holding him in contempt for refusal to testify before a federal grand jury in the Eastern District of Texas. Gerdes contends

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*Fed. R. App. P. 34(a); 5th Cir. R. 18.

he is exempt from such testimony by the terms of a plea bargaining agreement. On the present record, we are unable to determine whether or not the plea bargaining agreement the district court's contempt order and remand the case for an evidentiary hearing.

On September 18, 1979, appellant Gerdes pleaded guilty during the course of a trial to six counts of an indictment charging him with importing marijuana into the United States. His counsel learned during the trial that one of Gerdes' codefendants, also being tried at the time, Edward Culver, had made a plea bargaining agreement with the U.S. Attorney which, in part, exempted him from cooperation with the Government in any related ongoing investigation. Appellant's trial counsel to obtain a similar plea bargain for Gerdes. Accordingly, an agreement was reached, and Gerdes and Culver entered guilty pleas on the same date.

The language of Gerdes' plea bargaining agreement provides in pertinent part: "It is understood by all parties hereto Defendant Gerdes has entered no agreement to cooperate in this cause or other investigations." This somewhat confusing and ambiguous sentence was added in handwriting by Gerdes' counsel at the end of a typewritten "Stipulation" prepared by Assistant U.S. Attorney David P. Baugh.

Subsequent to the entry of his guilty plea, Gerdes was subpoenaed to testify before a federal grand jury regarding the marijuana business of two specifically named individuals. Gerdes refused to respond to questions posed by the grand jury even though he was granted use immunity by the court. Gerdes based his refusal upon his belief that he had an agreement with the U.S. Attorney that he and Culver would not have to testify in any investigation. Gerdes was then cited for civil contempt for his refusal to answer, pursuant to 28 U.S.C. § 1826.

The contempt hearing held by the district court made only limited inquiry into the content and meaning of Gerdes' plea bargaining agreement. The Government made its case with the testimony of the grand jury's court reporter that Gerdes had failed to answer the grand jury's questions, and by introducing in evidence the plea bargaining agreement itself. Gerdes testified at the hearing that he refused to reply because of his plea bargaining agreement.

The Court also received in evidence affidavits from trial counsel for Gerdes and Culver to the effect that the defendants had both bargained for and received from the Government an agreement that they would not be required to cooperate in any ongoing investigation related to their convictions. Though the language of Gerdes' agreement is ambiguous, that in Culver's agreement is rather precise. It states:

> Further, the United States of America shall not call the Defendant as a witness in B-79-10-CR or any related cause arising from the conspiracy alleged herein and shall not require the cooperation of the Defendant with the government in any related on-going investigation.

The Government's position in this contempt proceeding is that the language in Gerdes' agreement is no agreement at all and that it can compel his cooperation if necessary. The district court held that the language exempted Gerdes only from testifying "in the trial which was taking place at the time he entered the plea of guilty." Tr. 100. Obviously, Gerdes bargained for something in this regard and it is not clear why it is not the same as his codefendant Culver obtained in his agreement. Certainly Culver cannot be required to testify before the grand jury in view of his agreement. We have a somewhat incomplete record upon which to base our decision, and it is evident that the testimony of Assistant U.S. Attorney

Buagh, who made both agreements, is essential for us to determine what transpired. Likewise, the affidavits of counsel for Gerdes and Culver are conclusory and more factual detail from them would be of assistance to us in deciding whether the Government is attempting to breach its plea bargaining agreement with defendant Gerdes. Gerdes' contentions are at least plausible and not completely refuted by the Government's evidence. On the other hand, the terms of his plea bargaining agreement, though ambiguous, do not fully confer immunity upon him.

Because it is, therefore, impossible on the present record to determine where the truth lies in this case and whether appellant Gerdes may properly be excused from testifying before the grand jury because of an agreement with the Government to that effect, we vacate the district court's order and remand this case for a full evidentiary hearing which will be helpful both to the district court and to ourselves in the ultimate resolution of this case.

VACATED AND REMANDED

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-1167
SUMMARY CALENDAR

IN RE GRAND JURY PROCEEDINGS
CARLOS GERDES
Appellant

Appeal from the United States District Court for the Eastern District of Texas

(AUGUST 25, 1980)

Before
AINSWORTH, FAY and RANDALL, Circuit Judges.

PER CURIAM:

Carlos Gerdes renews his appeal from the district court's order holding him in contempt for refusal to testify before a federal grand jury in the Eastern District of Texas. This appeal follows the evidentiary hearing in the district court and its upholding by the trial judge of the prior contempt order. We vacated the original order of Judge Fisher and remanded the case to the district court to obtain additional evidence for a determination of whether the written plea bargaining agreement was sufficient to exempt Gerde's grand jury testimony. Judge Parker conducted the new hearing and upon its conclusion held that the time of the execution of the plea bargaining agreement, the parties did not intend that Gerdes be excused from testifying in a future grand jury proceeding. We affirm.

In our first per curiam opinion dated April 4, 1980, we held

that the original record was insufficient to establish the actual plea bargaining agreement entered into by the parties. According to appellant Gerdes, his agreement with the U.S. Attorney exempted him from cooperation with the Government in any related ongoing investigation with the Government in any related ongoing investigation in exchange for his plea of guilty to six counts of an indictment charging him with importing marijuana into the United States. This was denied by the Assistant U.S. Attorney. The pertinent language of the agreement reads in part: "It is understood by all parties hereto Defendant Gerdes has entered no agreement to cooperate in this cause or other investigations." It is this ambiguous sentence that we found necessary to have clarified by parol evidence.

At the evidentiary hearing, the district judge concluded that there is no ambiguity in the written agreement and that the parties did not intend that appellant could not be compelled to testify in all related investigatory proceedings such as the present grand jury inquiry. Although we find the pertinent language of the plea bargaining agreement not to be absolutely clear, we nevertheless find that the evidence does not show that the district court's holding is clearly erroneous as to the intent of the parties. *United States v. Troutman,* 5 Cir., 1979, 590 F.2d 604, 606; *United States v. Cruz,* 5 Cir., 1978, 581 F.2d 535, 540. Both district judges who heard this case, Judges Fisher and Parker, came to the same conclusion.

Appellant Gerdes also asserts that if it is found the agreement did not include an exemption from future testimony, such as that by the grand jury, that he should not be held in contempt from the time of the original contempt order on January 29, 1980, but rather from the time of the order of the further evidentiary hearing on June 5, 1980. While we vacated the original contempt order in our ruling of April 4, 1980, we also remanded the case for an evidentiary hearing which would be helpful in the resolution of this case. The effective date of the contempt is therefore January 29, 1980.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE:
GRAND JURY PROCEEDINGS
JANUARY 29, 1980

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JAN. 29, 1980
MURRAY L. HARRIS, CLERK

CIVIL NO. B-80-62-CA

ORDER

The Court hereby orders that CARLOS GERDES be held in contempt of court for failure to obey the Court's Order of January 25, 1980, directing CARLOS GERDES to testify before the Grand Jury and extending immunity to CARLOS GERDES with regard to such testimony.

It is ORDERED that GERDES' sentence in Cause No. B-79-10-CR, imposed by Judge Fisher on October 12, 1979, be and hereby is suspended and tolled while GERDES remains in contempt of this Court's order.

It is hereby ORDERED that GERDES shall not be entitled to credit for time spent in custody pursuant to this contempt order.

It is further ORDERED that CARLOS GERDES be confined to Jefferson County Jail until he complies with the Court Order of January 25, 1980, or until the current term of the Grand Jury expires.

(SIGNED AND ENTERED the 29th day of January, 1980.)

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE:
GRAND JURY PROCEEDINGS
JANUARY 29, 1980
CARLOS GERDES

B-80-62-CA

FILED
U.S. SUPERIOR COURT
EASTERN DISTRICT OF TEXAS
JUNE 1980
CLERK

ORDER

ON THE 23rd day of April the matter of Carlos Gerdes appearance before the Grand Jury and his refusal to testify came on to this court after remand by the Fifth Circuit and oral transfer by the Honorable Joe J. Fisher. Whereupon, the Court heard testimony on the precise issue set forth by the Fifth Circuit, i.e. whether Mr. Gerdes had bargained for and received a right to refuse to testify in collateral proceedings in exchange for his plea of guilty.

After hearing the testimony of the witnesses and hearing the arguments of counsel, the Court concluded that reasonable

minds could not have differed that the sentence appended to the plea bargain referring to "no agreement to cooperate" did not mean that Mr. Gerdes had received a promise from the Government that he would not be called as a witness in a subsequent proceding. In conformity with the specific findings from the bench, the Court ordered that Mr. Gerdes recalcitrance was not justified by the terms of his plea bargain. The Court, further ORDERED that Mr. Gerdes be returned to the Jefferson County Jail pending compliance with the order to testify issued on January 25, 1980 or until the expiration of the current term of the Grand Jury.

It was further ORDERED that Mr. Gerdes shall not be entitled to credit for time spent in custody pursuant to this contempt order. In that regard, it is ORDERED that Mr. Gerdes sentence in B-79-10-CR remain tolled and suspended until such time as this contempt order is satisfied by the witness's purging himself, expiration of the Grand Jury Term, or by dissolution.

(SIGNED and ENTERED this the 5th day of June, 1980.)

EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-1167

IN RE: GRAND JURY PROCEEDINGS
CARLOS GERDES
APPELLANT

U.S. COURT OF APPEALS
FILED
OCT 15 1980

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING
(October 15, 1980)

Before
AINSWORTH, FAY and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby (denied).

ENTERED FOR THE COURT:

United States Circuit Judge